Overnite Transportation Company, Inc. International Brotherhood of Teamsters, Local Union 385, AFL–CIO. Cases 12–CA–19417 and 12–CA–19636

November 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On June 4, 1999, Administrative Law Judge Richard H. Beddow Jr., issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting and answering brief. The Respondent filed a reply brief and an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

AMENDED CONCLUSIONS OF LAW

Substitute the following for conclusion of law 3:

"3. By promulgating, maintaining, and enforcing a lunchbreak rule which prohibits driver employees from taking their lunchbreaks at the Respondent's service center after the sixth hour of work, or which requires driver employees to take lunchbreaks between their fourth and sixth hour of work, in order to limit opportunities for its driver employees to engage in union activities, and by impliedly threatening an employee with discharge because of his union sympathies, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Overnite Transportation Company, Inc., Ocoee, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act by promulgating, maintaining, or enforcing a written or oral rule which prohibits employees from taking their lunchbreaks at Respondent's service center after the sixth hour of work, or which requires employees to take lunchbreaks between their fourth and sixth hour of work, in order to limit opportunities for its driver employees to engage in union activities.

(b) Impliedly threatening employees with discharge because of their union sympathies.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the lunch policy promulgated on April 3, 1998, and remove from its files any records or reference reflecting each employee's acknowledgement of receipt of the written policy and within 3 days thereafter notify the employees in writing that this has been done and that the records will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its Ocoee, Florida, facilities, copies of its policy repudiation and copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 con-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions, unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's inadvertent error in sec. II, par. 6, of the decision, in which he referred to an incident involving supervisor Jonas Smith and employee David Fox as occurring on April 18, 1998. Based on the credited testimony, the correct date is April 2, 1998.

[2] Consistent with the General Counsel's cross-exceptions, we shall revise the conclusions of law, recommended Order, and notice in accordance with the complaint allegations, which are supported by the record. We shall also modify paragraph 2(b) of the recommended Order to conform to the Board's decisions in *Indian Hills Care Center,* 321 NLRB 144 (1996), and *Excel Containers, Inc.,* 325 NLRB 17 (1997).

In the remedy section of his decision, the judge cited *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978), for the proposition that the Respondent must repudiate its illegally promulgated lunchbreak rule. While we agree that the rule should be rescinded, we find it unnecessary to rely on *Passavant Memorial Area Hospital.* We rely instead on *Youville Health Care Center,* 326 NLRB 495, 496 (1998) (Board ordered respondent to rescind discriminatorily promulgated rule restricting employee discussions of working conditions).

[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

secutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 3, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act by promulgating, maintaining, or enforcing a written or oral rule prohibiting our driver employees from taking their lunchbreaks at our service center after the sixth hour of work, or which requires our driver employees to take lunchbreaks between their fourth and sixth hour of work, in order to limit opportunities for driver employees to engage in union activities.

WE WILL NOT impliedly threaten our employees with discharge because of their union sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the lunch policy promulgated on April 3, 1998, and remove from our files any records or reference reflecting each employee's acknowledgement of receipt of the written policy and, within 3 days thereafter, notify the employees in writing that this has been done and that the records will not be used against them in any way.

OVERNITE TRANSPORTATION CO., INC.

Thomas W. Brudney, Esq., for the General Counsel.
Tommy D. McCutchen and *Kenneth F. Sparks, Esqs*., of Chicago, Illinois, for the Respondent.
Jack Barmon, of Orlando, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Orlando, Florida, on March 12, 1999. Subsequently, briefs were filed by the General Counsel and the Respondent. The proceeding is based on a charge filed April 8, 1998,[1] by International Brotherhood of Teamsters, Local Union 385, AFL–CIO. The Regional Director's consolidated complaint dated October 29, 1998, alleges that Respondent, Overnight Transportation Company, Inc., of Richmond, Virginia, violated Section 8(a)(1) of the National Labor Relations Act by changing and enforcing new lunchbreak rules in order to prevent or limit employees' participation in union activities and by threatening or impliedly threatening employees with discharge because of their union membership or activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a nationwide motor common carrier of general commodities and operates a terminal in Ocoee, Florida. It annually derives gross revenues in excess of $50,000 from the transportation of general commodities from Ocoee to points outside Florida. It admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2) and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent's Ocoee terminal has approximately 72 employees, including 23 city drivers (also known as pick-up and deliver drivers) who leave the service center in the morning to deliver or pick up freight from customers to bring back to the service center at the end of their shifts. One half of the freight handled at Ocoee was delivered or picked up by appointment. City drivers report to work between 3 a.m. and 9 a.m., return to the terminal generally between 4 p.m. and 7 p.m., and they generally are running their routes, either delivering or picking up freight, between their 4th and 6th hour of work.

[1] All following dates will be in 1998, unless otherwise indicated.

Respondent also employs road or line haul drivers that drive between different terminals where they drop off trailers and pick up other trailers to bring back to the Ocoee terminal. Most road drivers leave the terminal on their routes after 9 p.m. City drivers are paid on an hourly rate, whereas road drivers apparently are compensated on a mileage basis.

Jonas Smith is the terminal's "outbound" dock supervisor, is in charge of activities from midafternoon until midnight and has nominal responsibility for city drivers returning to the terminal. Mark Campbell was the operations manager at Ocoee until he was transferred to a position as terminal manager in Decatur, Alabama, in October 1998. Chuck Graham became the Ocoee terminal manager in June 1997 when he replaced former manager, Edgar Dycus.

The Ocoee terminal is not unionized and the Union has not filed a petition seeking to represent its driver employees since 1987. For several years prior to 1998, however, city driver David Fox had been engaging in union activities, such as talking about the Union to other drivers before and after work in the employee parking area and in the drivers' breakroom inside the terminal after returning from his route. He had not openly displayed his union sympathies to management until on or about March 5, when he began to wear a hat that said "Overnite Teamsters" and about 1 month later, he began to occasionally wear a union T-shirt at work (since about June 30, Fox has been out of work on workers' compensation leave).

City driver Daniel Lago began talking to other drivers, distributing union literature, and soliciting authorization cards in early 1998 but he did not openly display his union sympathies to management until about June 18, when he began to wear a hat that said "Overnite Teamsters." Lago continued to wear this or a similar hat every day at work, and also regularly wore buttons and pins identifying his union sympathies. Both Terminal Manager Graham and Operations Manager Campbell saw Fox and Lago wearing their union hats and T-shirts at work. Smith acknowledged that he had seen Fox with the Teamsters but could not recall if he had paid any attention to that prior to April when he had a brief conversation with Fox about the timing of Fox's lunchbreak.

Although Smith did not attend employee morning meetings because of his work schedule, he was aware that the Union was attempting to organize the Respondent nationwide and he knew that the Company opposed these efforts. On the afternoon of April 18, Smith saw Fox turn in his paperwork and then "just" stand and talk to a mechanic and a road driver. He testified that he asked Fox what he was doing and if he was still on the clock. When Fox replied yes, he was on his lunchbreak, Smith asked him why, and assertedly said, "normally you don't come in an [sic] take your lunchbreak at the end of the day" and he allegedly just walked off.

Fox testified that after Smith asked him what he was doing, he replied that he was taking his lunchbreak and Smith then told Fox to "get off the clock and get off the property, you can't take your lunch at terminal, you have to take if before you get here." Fox replied that this was news to him, and then followed Smith's instructions. Smith said he understood the lunchbreak policy to require employees (especially those at the facility) to clock out for 30 minutes after 6 hours at work but that he didn't tell city drivers when to take their lunchbreaks.

On April 3, the day after Smith spoke to Fox, the Respondent promulgated the following written policy with respect to lunchhours for employees at the Ocoee terminal, and it required each city driver to sign in acknowledgement of receipt:

> IT IS MANDATORY THAT ALL EMPLOYEES TAKE A LUNCH WHEN WORKING 6 HOURS OR MORE PER DAY.
>
> LUNCH MUST BE TAKEN BETWEEN THE 4TH AND 6TH HOUR FROM THEIR STARTING TIME FOR THAT DAY WITH LUCH BEING COMPLETED AT THE 6TH HOUR.
>
> THERE WILL BE NO EXCUSES FOR LUNCH TO BE TAKEN ANY OTHER TIME EXCEPT FOR THE 4TH THROUGH 6TH HOUR FROM THE STARTING TIME OF THAT DAY. THIS POLICY HAS ALWAYS BEEN IN PLACE BECAUSE IT IS A FEDERAL LAW AND WE WILL FOLLOW THIS PROCEDURE EACH AND EVERY DAY.

Campbell and Graham both understood that since 1987, Respondent had an unwritten policy that city drivers received an unpaid half-hour lunchbreak when they worked more than 6 hours and that the Respondent automatically deducted one half hour from each city driver's pay each day the driver worked more than 6 hours (as reflected on their daily trip cards). Prior to April, both Fox and Lago (as well as former city driver Edward Ginn), never were told to take his lunchbreak before the 6th hour of work, or between the 4th and 6th hour of work and that they took a lunchbreak whenever it was convenient after getting the most freight off the truck. If time permitted, it was done on route, generally after the 6th hour, frequently on the way back to the terminal, and sometimes back at the terminal in plain view of supervisors such as Smith, Graham, and Campbell. These drivers also observed that other city drivers appeared to follow the same practice. Graham has never issued a corrective action report or discharged an employee for violating the policy and however, there is no evidence that any city drivers have violated, since it was promulgated, however, there is no indication that the Respondent has taken any affirmative action to repudiate its memo. The Respondent has a written policy concerning union solicitation, which permits employees to engage in union solicitation on Respondent's property only during "non-working time." Graham testified that lunchbreaks, when taken pursuant to this solicitation policy, constitute "non-working time," and that city drivers can engage in union solicitation during their lunchbreak only if they take their lunchbreak between their 4th and 6th hour, as required under the lunchbreak new policy.

On July 28, Graham called a mandatory meeting of all city drivers at the terminal in order to discuss union-related problems. Just before the meeting began, Graham spoke to Lago individually, complemented him on his neat appearance, noting that his hair was cut and his beard was trimmed. Lago, who has recently had a hair cut, replied that the Union was talking about having job actions at some of the union-represented terminals, and that he may be involved in walking on a picket line, so he

wanted to look presentable. Lago testified that Graham replied: "I'd be more concerned about my future with Overnite, because at this time it's real iffy." Lago did not respond. Lago testified that Graham turned to walk away and repeated the statement, and the words "real iffy."

Graham admitted that he had an exchange with Lago but testified that he never told Lago that "his future in the company was iffy because of his union activities." He was not asked whether he spoke the words attributed to him by Lago. Graham also testified that he never told Lago that all union employees would soon be out of the Company and that he read verbatim from press releases prepared for him by Respondent at its corporate headquarters. He admitted, however, that he deviated from the press releases, and testified that he was instructed to "answer any questions that we knew we had the answer to."

III. DISCUSSION

The issues in this case arose where the Respondent formalized lunchbreak rules shortly after union supporter David Fox began to overtly display his union sympathies and after a supervisor saw him talking to other employees when he had finished his daily run and returned to the terminal. Thereafter, Dock Supervisor Smith told him to get off the dock and off the property and the terminal manager issued a lunchbreak memo and held a meeting where he read a company press release concerning union organizing attempt and then allegedly told another overt union supporter that his future with the Company was "really iffy."

Here, city driver Fox had engaged in covert union activities with other employees for several years and in early March, contemporaneously with ongoing union organizational activities at other terminals in Florida, he overtly began to wear a union hat (and occasional T-shirt). The employer was opposing the organizational efforts and Managers Campbell and Graham otherwise were aware of Fox's actions and, subsequently, the similar overt action of driver Daniel Lago. Although supervisor Smith could not "recall" if he had "paid any attention" to Fox's union paraphernalia, I find that all three supervisors had knowledge of both Fox's and Lago's union sympathies at the time of the respective alleged violations.

First, I credit the evidence that Smith told Fox that he could not be on the clock, on lunchbreak, after returning to the terminal and told him to get off the clock and off the property. The next day management codified this rule with a newly printed and posted rule requiring lunch only between the 4th and 6th hour. The Respondent defends its actions by asserting that it had legitimate reasons for its rule, that the rule was not promulgated in response to union activity, that the rule doesn't prohibit Section 7 activity, and that it has not enforced the rule for that purpose.

Contrary to the Respondent's contentions, I find that the timing of the enforcement of the unwritten rule and its immediate issuance and posting in written form implies that it occurred in response to the employees' recent overt union activities and because of the Respondent's suspicion that Fox's belated lunchbreak conversation with other employees related to union activities.

While the rule might have greater applicability to the dock workers and other employees under Smith's supervision, it is clear that in the past it had not been applied to city drivers who, by the nature of their jobs and in the furtherance of the interest of the employer and its customers, generally attempted to accomplish their deliveries during the 6–hour period proscribed in the rule. Moreover, Smith's remarks to Fox (I credit Fox's specific recall over Smith's partial failure to recall all that he said before, "just walking off") included the admonition to "get off the clock and get off the property" and imply management's displeasure with his use of nonworking time for possible union activities. This supports the conclusion that Smith's comment was unlawfully motivated and intended to restrict Fox's potential union activities and, accordingly, I find that Smith's action was a violation of Section 8(a)(1) of the Act, as alleged.

I credit Fox's testimony that it was his practice to get all delivery freight off his vehicle before taking his lunchbreak, that he left the terminal at 8 a.m., and at various times did not have his lunchbreak until after 3 p.m. and only infrequently before the 6th hour. He also sometimes took his lunchbreak back at the terminal (10 times in 14 years), but more frequently would stop on his way back at a convenience store about 6 miles from the terminal and sit for 30 minutes with a soda. Otherwise, the testimony of other city drivers, including the Respondent's own witness, driver Eric Nieves (and his timecards), show that drivers regularly started lunchbreaks after the 6th hour.

It is well established that an employer violates Section 8(a)(1) of the Act by implementing a new policy in response to a union organizing campaign, or by enforcing previously unenforced policies, where the employer's purpose in so doing is to restrict opportunities for employees to engage in union activities, see, for example, *Tualatin Electric,* 319 NLRB 1237, 1237 (1995); *Wellstream Corp.,* 313 NLRB 698, 698 (1994); *Ideal Macaroni Co.,* 301 NLRB 507 (1991), *Horton Automatics,* 289 NLRB 405 (1988); and especially, *Miller Group,* 310 NLRB 1235 (1993).

Here, the promulgated rule appears to be overly broad and it has the effect of changing the manner in which city drivers arrange their work schedules and it also has the effect of precluding city drivers from engaging in protected concerted activities after they complete their runs and return to the terminal. Also, I find the Respondent's reasons (including productivity and safety claims), are patently pretextual and I am not persuaded that the Respondent needed to take its action regarding compliance with purported "federal" law at the time it did. Otherwise, there is no demonstrated compelling reason for the Respondent's actions that would require the Board to excuse the Respondent's actions, compare *Watsonville Register-Pajaronian*, 327 NLRB 957 (1999).

While the Respondent asserts a number of "reasons," they appear to be after the fact excuses and I am not persuaded that these reasons, legitimate or not, were evaluated prior to its sudden decision to react to Fox's suspected union activities. Otherwise, there is no evidence that Campbell and Graham checked federal law requirements when they were assertedly alerted by a comment and "guidelines" offered on February or March by an auditor firm, its parent company. Nothing was done until April 3 just after Fox became overt in his union ac-

tivities and immediately after he was observed and warned about talking to other employees after he had returned to the terminal.

Under these circumstances, I conclude that the General Counsel has persuasively shown that the reason for the April 3 lunch policy change, was not those asserted by Respondent, and that the true reason was an intent to limit opportunities for employees, such as Fox, to engaged in union activities. Accordingly, I find that the Respondent is shown to have violated Section 8(a)(1) of the Act in these respects, as alleged.

Respondent has failed to take any timely, unambiguous action to repudiate the April 3 lunch policy memorandum or to give employee assurances that it will not interfere with their Section 7 rights and the retention of an illegal but unenforced rule is unlawful because it tends to chill the exercise of employee Section 7 rights, see *NLRB v. Beverage Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968).

City driver Daniel Lago began to overtly display his union sympathies about June 18 and he convincingly described how a short time later Graham spoke to him before a mandatory driver meeting and complemented him on his neat appearance. Lago recalled that he recently had his haircut and beard trimmed, and that he made a reply to the effect that wanting to look presentable as he might be walking a picket line. Lago recalls that Graham replied: "I'd be more concerned about my future with Overnite, because at this time it's real iffy" and he heard Graham repeat the phrase "real iffy" as he walked away.

Graham recalled that he had a one to one exchange with Lago after a meeting held at the terminal at the end of July and that in the meeting he discussed the threatened strike by Union members at various of Respondent's unionized terminals, including nearby Miami, and Graham recalled that Lago asked him "how will I be affected—or how will I be affected or how will I be thought of about the strike" and that he then instructed Lago that he would be expected to come to work. Graham testified that he never told Lago that "his future in the company was iffy because of his Union activities" but he was not asked whether he ever uttered the words attributed to him by Lago. Except for the fact of when the exchange took place (before or after the meeting), it is clear that a conversation took place and that a subject matter of the meeting involved a threatened strike. Lago's recall is consistent with the sequence of events, while Graham's testimony does not refute the exact statement Lago claims Graham uttered and I find that Graham's testimony appears to be evasive, without being clearly untruthful.

Graham also testified that he has sent seven Ocoee drivers to Miami as strike replacements and that the meeting at which he and Lago spoke

> was in the heat of the threatened strike. I had employees in Miami. We were struggling at the time to service our customers, to be honest with you. When you lose seven people out of your operation at one time, it's tough.

Under these circumstances, I find it likely that Graham would respond to Lago's somewhat flippant remark in the manner attributed to him by Lago and, accordingly, I find Lago's testimony to be credible and more trustworthy than Graham's equivocal answers.

I find that the meeting concerned the Union's organizing efforts at other terminals, that Lago was a known union sympathizer and that he had made a remark about walking a picket line. As noted above, I have also found that Graham responded with a remark that Lago's needed to be concerned with his future with the Respondent because it was "real iffy," I find that such a remark, by the principal management official at the terminal, clearly, supports a conclusion that an employee would reasonably believe that Graham was threatening adverse employment prospects for engaging in union activity. Accordingly, I conclude that Graham's remark reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act and I find that the Respondent's action was unlawful and in violation of Section 8(a)(1) of the Act, as alleged.

IV. CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By enforcing an unwritten lunchbreak rule on a city driver, by promulgating and posting a written rule requiring the lunchbreak to be between the 4th and 6th hour, and by impliedly threatening an employee with discharge because of his union sympathies, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair practices in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it necessary to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, this action shall include repudiation of its illegally promulgated policy in a manner consistent with the Board's decision in *Passavant Memorial Area Hospital*, 237 NLRB 138, (1978), and cases cited therein.

Because of the nature of the violations it is unnecessary that a broad order be issued, see *Hickmott Foods,* 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]